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PEABODY ENERGY CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

16 NATIVE VILLAGE OF KIVALINA, *et al.*,) CASE NO. C08-01138 SBA
17 Plaintiffs,)
18 v.)
19 EXXONMOBIL CORPORATION, *et al.*,)
20 Defendants)
21)
22)
23)
24)
25)

) **NOTICE OF MOTION AND MOTION**
) **TO DISMISS OF DEFENDANT**
) **PEABODY ENERGY**
) **CORPORATION FOR LACK OF**
) **SUBJECT MATTER JURISDICTION**
) **PURSUANT TO FED. R. CIV. P.**
) **12(b)(1) AND FOR FAILURE TO**
) **STATE A CLAIM UPON WHICH**
) **RELIEF MAY BE GRANTED**
) **PURSUANT TO FED. R. CIV. P.**
) **12(b)(6)**
)
) DATE: December 9, 2008.
) TIME: 1 P.M.
) JUDGE: Hon. Saundra B. Armstrong
)

26 || TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that at 1 p.m. on December, 9, 2008, or as soon thereafter as

1 the matter may be heard, in the above-entitled court, defendant PEABODY ENERGY
2 CORPORATION (“Peabody”) will move and hereby does move pursuant to Rules 12(b)(1) and
3 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the Complaint with
4 prejudice.

5 By this Motion and the accompanying Memorandum of Points and Authorities, Peabody
6 seeks an order dismissing the Complaint with prejudice and without leave to amend.
7

8 DATED: June 30, 2008

CROWELL & MORING LLP
9 By: /s/ STEVEN P. RICE

10 Attorney for Defendant
11 PEABODY ENERGY CORPORATION

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiffs are an Alaskan tribe and an incorporated Alaskan municipality where they
 4 reside, which is located 70 miles north of the Arctic Circle. They have filed an action asking this
 5 Court in California to find that some two dozen companies, including Peabody Energy
 6 Corporation (“Peabody”), are responsible for property damage in Alaska allegedly resulting from
 7 loss of Arctic sea ice. They do so under a “global warming” tort theory that has no basis in
 8 either federal or state law.

9
 10 Peabody moves to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the
 11 Federal Rules of Civil Procedure because the Court lacks subject matter jurisdiction and
 12 plaintiffs have failed to state a claim upon which relief may be granted. *First*, the Court does not
 13 have subject matter jurisdiction over the lawsuit. Plaintiffs lack Article III standing to bring their
 14 claims because their alleged injury is not fairly traceable to the actions of Peabody. *Second*,
 15 plaintiffs’ claims are nonjusticiable under political question doctrine because climate change and
 16 the related phenomenon of “global warming” are uniquely political in nature, bound up in
 17 questions of this nation’s energy and economic policy, foreign and domestic relations, as well as
 18 interstate and foreign commerce. *Third*, plaintiffs’ claims are either displaced or preempted by
 19 the Clean Air Act and other acts and policies of Congress and the Executive Branch, which
 20 embody a federal policy that would be undermined by allowing so-called tort lawsuits like this
 21 one to proceed, under either a federal or state common law theory.¹ *Fourth*, plaintiffs’ nuisance

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 23 ¹ Were this case to proceed, it would pose complex choice-of-law issues. The Court need not
 24 address those issues at this stage, because plaintiffs’ state law claims are defective regardless of
 25 which state’s law applies. The weaknesses of plaintiffs’ state law claims law are illustrated
 26 below using California law; however, Peabody does not concede that California law governs
 27 plaintiffs’ state law claims.

1 claims fail because the Complaint does not plausibly demonstrate that Peabody caused plaintiffs' 2 alleged injuries. *Fifth*, plaintiffs cannot show that they have been injured. *Sixth*, where plaintiffs 3 base their nuisance claims on the emission by Peabody of methane from mining operations, such 4 conduct is expressly authorized by statute. *Seventh*, plaintiffs' claim of civil conspiracy to 5 commit a nuisance fails because plaintiffs cannot state the underlying claim for nuisance. 6 *Eighth*, to the extent the conspiracy is premised on a conspiracy to commit fraud, it fails because 7 plaintiffs have not pled facts relating to any alleged fraud with the specificity required by Rule 8 9(b). *Ninth*, the conspiracy claim must also fail as to Peabody because Peabody's alleged actions 10 are protected by the First Amendment. *Tenth*, plaintiffs' concert of action claim fails because 11 plaintiffs cannot show that Peabody caused any damages to plaintiffs or encouraged others to do 12 so.

13 **II. BACKGROUND**

14 **A. The Climate Change Backdrop**

15 Congress and the Executive Branch have long been focused on the issue of climate 16 change, as the following brief summary demonstrates.²

17 As early as 1978, Congress enacted the National Climate Program Act, 15 U.S.C. § 2901,
18 *et seq.*, through which it established a national climate program to study climate change.

19 ² In deciding this motion, the Court may take notice of laws, proposed legislation, conventions,
20 rules and other matters of public record. See, e.g., 44 U.S.C. § 1507 (2006) (contents of Federal
21 Register "shall be judicially noticed"); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir.
22 2001) (matters of public record); *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142,
23 1146 (9th Cir. 1998) (publicly issued letters from an agency); *Green v. United States*, 67 F.2d
24 846 (9th Cir. 1933) (presidential proclamations); *Yeboah v. United States Dep't of Justice*, 345
25 F.3d 216, 222 n.3 (3d Cir. 2003) (pending legislation); *County of Suffolk v. First Am. Real Estate
Solutions*, 261 F.3d 179, 189 n.5 (2d Cir. 2001) (same); *Coupe v. Fed. Express Corp.*, 121 F.3d
1022, 1026 n.3 (6th Cir. 1997) (Federal Register); *Connecticut v. Am. Elec. Power Co.*, 406 F.
Supp. 2d 265, 268 (S.D.N.Y. 2005) ("AEP"), appeal docketed, No. 05-5104 (2d Cir. Sept. 22,
2005).

Congress followed in 1980 with the Energy Security Act, 94 Stat. 611, 774-75, through which it directed the Office of Science and Technology Policy to work with the National Academy of Sciences to study the impact of fossil fuel consumption and related activities on the Earth’s atmosphere. In 1987, the Secretary of State was charged by Congress to coordinate international negotiations on the topic of global warming on behalf of the United States. Global Climate Protection Act, 15 U.S.C. § 2901 note; *id.* § 2952(a). In the same legislation, Congress directed EPA to propose to Congress a “coordinated national policy on global climate change.” *Id.* § 2901 note. In 1990, Congress enacted the Global Change Research Act, 15 U.S.C. §§ 2931-38, establishing a ten-year, comprehensive research program to study global climate issues and trends. Congress has also enacted laws focusing on global warming and its effects with respect to agriculture, Global Climate Change Prevention Act, 104 Stat. 4058 (1990), and energy, Energy Policy Act of 1992, 106 Stat. 2776, 3002.

In 1992, President George H.W. Bush signed the United Nations Framework Convention on Climate Change (“UNFCCC”), which stemmed from the 1987 Global Climate Protection Act, and which the Senate subsequently ratified. *See* UNFCCC art. 2, May 9, 1992, 31 I.L.M. 849, S. Treaty Doc. No. 102-38 (1992). The UNFCCC brought together an international coalition of countries to address global warming on the global stage. This convention in turn negotiated and created the Kyoto Protocol in 1997, which President Clinton signed but which was never presented to the United States Senate for ratification. Indeed, the Senate passed a resolution specifically objecting to the Kyoto Protocol. *See* S. Res. 98, 105th Cong. (1997). The Senate expressed the view that the protocol would harm the U.S. economy by too severely curtailing carbon dioxide emissions while doing nothing to regulate the emissions of developing nations such as China and India, both significant emitters of carbon dioxide. Congress subsequently

1 passed a series of laws barring EPA from implementing the Kyoto Protocol. Veterans Benefits
 2 Administration, 112 Stat. 2461, 2496 (1998); 113 Stat. 1047, 1080 (1999); 114 Stat. 1441,
 3 1441A-41 (1999).

4 The current administration has adopted a policy of working in cooperation with other
 5 countries to address global warming and climate change through a “prudent” and “realistic and
 6 effective long-term approach.” Control of Emissions from New Highway Vehicles and Engines,
 7 68 Fed. Reg. 52,922, 52,933 (Sept. 8, 2003). The EPA has stated: “It is hard to imagine any
 8 issue in the environmental area having greater economic and political significance than
 9 regulation of activities that might lead to global climate change.” *Id.* at 52,928. The EPA also
 10 has reaffirmed the view of the Administration that “climate change raises important foreign
 11 policy issues” which are “the President’s prerogative to address,” *id.* at 52,931, and that
 12 “[v]irtually every sector of the U.S. economy is either directly or indirectly a source of
 13 [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical,
 14 and political-level discussions about climate change.” *Id.* at 52,928.

17 Furthermore, the Clean Air Act already provides a means for regulating greenhouse
 18 gases. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007). In *Massachusetts*, the Supreme
 19 Court overturned an EPA denial of rulemaking petition asking the agency to regulate greenhouse
 20 gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act. The Court
 21 held that greenhouses gases, including carbon dioxide, fall within the Act’s definition of “air
 22 pollutant,” and thus can be regulated by EPA under certain prescribed circumstances. Because
 23 EPA had previously denied the petition for rulemaking on the basis that it lacked authority to
 24 regulate greenhouse gas emissions under the Clean Air Act for the purpose of addressing climate
 25 change, the petition for rulemaking was remanded back to EPA for reconsideration in light of the
 26
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1 Court's opinion.

2 In response to the Court's decision in *Massachusetts*, EPA has announced its intention to
 3 issue an Advance Notice of Proposed Rulemaking to solicit public comment on numerous issues
 4 related to possible regulation of greenhouse gases under the Clean Air Act, including possible
 5 regulation of sources other than motor vehicles. *See Letter from Stephen L. Johnson, EPA*
 6 *Administrator to Henry A. Waxman and Tom Davis, U.S. Representatives (March 27, 2008),*
 7 *available at* [*http://oversight.house.gov/documents/20080327170233.pdf*](http://oversight.house.gov/documents/20080327170233.pdf).

9 Not only does the Clean Air Act allow EPA to regulate greenhouse gas emissions,
 10 Congress has been actively debating comprehensive legislation focused specifically on
 11 greenhouse gas emissions and the broader issue of climate change. *See Climate Security Act, S.*
 12 *3036, 110th Cong. (2008); see also Climate Stewardship and Innovation Act of 2007, S. 280,*
 13 *110th Cong. (2007); Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Electric*
 14 *Utility Cap and Trade Act of 2007, S. 317, 110th Cong. (2007); Global Warming Pollution*
 15 *Reduction Act, S. 309, 110th Cong. (2007).*

17 In other words, the political process for addressing climate change issues has long
 18 functioned and continues to function.

19 **B. The Federal Response to Coastal Erosion in Kivalina**

20 Kivalina is the subject of Congressional attention. Over 60 years ago, Congress
 21 empowered the United States Army Corps of Engineers to address conditions caused by coastal
 22 erosion in the United States. Since then, Congress has specifically directed the Corps to assess
 23 and provide technical support to respond to erosion in Alaskan communities, including,
 24 specifically, Kivalina. The Corps' sources of authority and major federal actions include:

- 26 • The Flood Control Act of 1946, Pub. L. No. 79-526, § 14, authorizes the Corps to

1 provide emergency shore protection, and the Rivers and Harbors Act of 1962,
 2 Pub. L. No. 87-874, § 103, authorizes the agency to reduce coastal storm damage.
 3 The Shore Protection Cost Sharing Act of 1946, Pub. L. No. 79-727, also
 4 authorizes the Corps to undertake coastal storm damage reduction projects.

- 5 • Congress has authorized the Corps to provide technical assistance to Native
 American Tribes under the Tribal Partnership Program. *See* Water Development
 6 Act of 2000, Pub. L. No. 106-541, § 203.
- 7 • In 2003, Congress authorized and directed the Corps to study coastal erosion in
 several Alaskan communities, including Kivalina. It asked the Corps to report on
 8 several specific issues, including the costs of relocating these communities and
 the time period that each community faces for relocation. Congress also directed
 9 the agency to carry out any further necessary studies to address impacts of
 erosion. *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7,
 10 H.R. Rep. No. 108-10, at 807 (2003) (Conf. Rep.), S. Rep. No. 107-220, at 23-24
 11 (2002). Congress approved full federal funding for the coastal erosion study. *See*
 Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-
 12 137, § 12 (2003). The Corps submitted a report to Congress on its findings in
 April 2006.
- 13 • In 2004, Congress approved full federal funding for the preparation of a baseline
 erosion study to coordinate and plan responses and assistance for specified
 14 Alaskan villages – including Kivalina. Consolidated Appropriations Act, 2005,
 Pub. L. No. 108-447 (2004). The study is currently ongoing, and the Corps
 15 expects to publish a final report of the study in late 2008.
- 16 • Also in 2004, Congress passed Section 117 of the Consolidated Appropriations
 Act of 2005, which authorizes the Corps to carry out, *at full federal expense*,
 17 construction and other projects for storm damage prevention and reduction,
 coastal erosion, and ice and glacial damage in Alaska, *including relocation of*
 18 *affected communities and construction of replacement facilities*. *See*
 19 Consolidated Appropriations Act of 2005, Pub. L. 108-447, § 117 (2004).
- 20 • Pursuant to its Section 117 authority, the Corps has developed plans to undertake
 a special project in Kivalina that includes construction of a 3,100-foot-long rock
 21 revetment around the city to protect it from coastal erosion. Construction of
 approximately 900 feet of revetment is expected to begin in 2008. According to
 22 the Corps, work on the project will start in increments and additional revetment
 will be constructed as needed to control erosion – possibly over the next 10 or
 23 more years. The Corps already has prepared an Environmental Assessment and
 Finding of No Significant Impact for this project, which was released in
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September 2007. See U.S. Army Corps of Engineers, *Environmental Assessment and Finding of No Significant Impact: Section 117 Expedited Erosion Control Project Kivalina, Alaska* (2007).³

- In June 2006, the Corps released a final report assessing relocation needs and options for Kivalina. U.S. Army Corps of Engineers, *Kivalina Relocation Master Plan, Final Report* (2006).⁴ The investigation and report were conducted pursuant to congressional direction. See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7; H.R. Rep. No. 108-10, at 807; S. Rep. No. 107-220, at 23-24; Energy and Water Development Appropriations Act, 2004, Pub. L. 108-137; H.R. Rep. No. 108-357, § 112 (2003) (Conf. Rep.).

C. The Allegations Against Peabody

Notwithstanding the political nature of climate change, and the specific mechanisms created by Congress to address problems of coastal erosion in Kivalina, plaintiffs now seek to hold Peabody and a selected group of other companies liable for the purported effects of climate change on Kivalina. Plaintiffs bring claims for public nuisance under the federal common law, public and private nuisance under state law, civil conspiracy and concert of action. Among other things, plaintiffs ask the Court to award them monetary damages in an unspecified amount, and to enter a declaratory judgment for future monetary expenses and damages as plaintiffs may incur “in connection with the nuisance of global warming.” Complaint at ¶ 67.

The following allegations form the basis of plaintiffs’ claims against Peabody:

- Global warming is destroying the village of Kivalina, and the village will either need to be abandoned or relocated at great cost. *Id.* ¶¶ 1, 186.

³ Available at <http://www.poa.usace.army.mil/en/cw/Kivalina/Kivalina%20Erosion%20Control%20Environmental%20Assessment%20and%20FONSI.pdf>.

⁴ Available at <http://www.poa.usace.army.mil/en/cw/Kivalina/Kivalina.html>.

- 1 • Greenhouse gases trap atmospheric heat and cause global warming, which in turn
2 causes arctic ice to melt. The melting of the arctic ice has resulted in the loss of
3 protection from winter sea storms and increased Kivalina's vulnerability to
4 coastal erosion. Coastal erosion risks destruction of structures and infrastructure
5 in the village, and Kivalina is in danger of flooding. *Id.* ¶¶ 4, 185.
- 6 • Peabody, a Delaware corporation, emits greenhouse gases through mining
7 operations. *Id.* ¶¶ 52, 53, 177. It produces coal which, through subsequent
8 combustion, results in additional greenhouse gas emissions. *Id.* ¶ 178.
- 9 • Peabody is seeking to build two additional coal-fired power plants that will burn
10 additional coal and not capture or store the carbon dioxide released in the process.
Id. ¶ 179.
- 11 • Peabody participated in a "campaign" to inform the public that there is scientific
12 uncertainty about the cause and effects of global warming. *Id.* ¶ 189.

11 III. ARGUMENT

12 A. Standard of Review

13 1. Rule 12(b)(1) – Subject Matter Jurisdiction.

14 Where a federal court lacks subject matter jurisdiction over a case, it dismisses under
15 Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Fed. R. Civ. P.* 12(b)(1). Federal
16 courts are courts of limited jurisdiction, and the plaintiff always bears the burden of
17 demonstrating the existence of subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins.*
18 Co., 511 U.S. 375, 377 (1994). When ruling on a Rule 12(b)(1) motion to dismiss, the Court
19 may look beyond the complaint to matters of public record. *See White v. Lee*, 227 F.3d 1214,
20 1242 (9th Cir. 2000).

22 2. Rule 12(b)(6) – Failure to State a Claim.

23 Rule 12(b)(6) requires dismissal "where there is no cognizable legal theory or an absence
24 of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729,
25 732 (9th Cir. 2001). Conclusory allegations are insufficient to defeat a motion to dismiss, and
26 27

1 the Court may not draw unreasonable inferences in plaintiffs' favor. *See Cholla Ready Mix, Inc.*
 2 v. *Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (citations and quotations omitted). As the Supreme
 3 Court recently declared, plaintiffs' allegations must demonstrate that their right to relief is more
 4 than merely conceivable – it must be *plausible* on its face. *See Bell Atlantic Corp. v. Twombly*,
 5 127 S. Ct. 1955, 1964-65 (2007).

6

7 **B. Plaintiffs Lack Standing.**

8 Plaintiffs lack standing to pursue their claims. To demonstrate Article III standing,
 9 plaintiffs must show (1) they have suffered an “injury in fact,” meaning a concrete and
 10 particularized injury that is not “conjectural” or “hypothetical”; (2) a credible causal connection
 11 between the injury and the conduct complained of, meaning that the injury is “fairly . . .
 12 trace[able] to the challenged action of the defendant”; and (3) it is “likely” as opposed to
 13 “speculative” that the injury will be “redressed by a favorable decision.” *Lujan v. Defenders of*
 14 *Wildlife*, 504 U.S. 555, 560-61 (1992) (plurality opinion) (internal citations and footnotes
 15 omitted). Plaintiffs fail this test.

16

17 *First*, plaintiffs fail to plead facts permitting a finding or inference that their alleged
 18 injuries are “fairly traceable” to Peabody. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). The
 19 Complaint does not allege any facts that permit a finding or inference that *Peabody's actions*,
 20 versus the actions of literally every other greenhouse gas emitter on the planet, today and in the
 21 past, caused erosion of plaintiffs' village.

22

23 *Second*, the Complaint does not contain any facts permitting a finding or inference that
 24 plaintiffs' claims are redressable by the Court. For this Court to provide plaintiffs their requested
 25 remedy, it would first have to establish its own national policy on climate change and global
 26 warming, since it would have to establish a benchmark by which a jury could fairly weigh the

1 reasonableness of defendants' greenhouse gas emissions. In creating its own policy, the Court
2 would run the risk of contradicting policies established over the course of several decades by the
3 Congress and the Executive Branch, including policies currently being considered by Congress.
4 The Court should not accede to plaintiffs' request to invade the province of the other branches on
5 climate change policy. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

6 Another global warming tort suit was dismissed by a federal court on standing grounds.
7 In *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007) (unpublished) (Exh.
8 1), *appeal docketed*, No. 07-60756 (5th Cir. Oct. 22, 2007), plaintiffs brought a purported class
9 action on behalf of a putative class of Mississippi residents and property owners who alleged
10 damages stemming from Hurricane Katrina. The *Comer* plaintiffs asserted tort claims (including
11 nuisance claims) against many of the same companies who are defendants in this case (including
12 Peabody). The *Comer* plaintiffs alleged that defendants' greenhouse gas emissions caused
13 global warming, which in turn warmed the oceans, increased storms and storm intensity, and
14 ultimately increased the intensity of Hurricane Katrina, thereby producing the alleged injuries,
15 including property damage and coastal erosion. The court dismissed the case on standing
16 grounds, *inter alia*, finding plaintiffs' claims not fairly traceable to defendants. This Court
17 should reach the same conclusion.

18 **C. The Complaint Raises Nonjusticiable Political Questions.**

19 Although plaintiffs have dressed up this case as a traditional tort action for damages, in
20 reality plaintiffs ask this Court to usurp the work of Congress and the Executive Branch and
21 establish the nation's climate change policy. The Constitution prohibits the Court from doing so.
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27

1 **1. Plaintiffs' Claims Trigger *Baker v. Carr* Political Question
2 Considerations.**

3 The political question doctrine "is primarily a function of the separation of powers."

4 *Baker v. Carr*, 369 U.S. 186, 210 (1962). The judiciary has a critical, yet confined, role in our

5 tripartite form of government: when cases present political questions, "judicial review would be

6 inconsistent with the Framers' insistence that our system be one of checks and balances." *Nixon*

7 *v. United States*, 506 U.S. 224, 234-35 (1993). Thus, where a case turns on a political question,

8 courts lack the subject matter jurisdiction necessary to proceed. *See Schlesinger v. Reservists*

9 *Comm. to Stop the War*, 418 U.S. 208, 215 (1974). When political and policy choices are front

10 and center, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving

11 the struggle between competing views of the public interest are not judicial ones." *Chevron*

12 *U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

14 The Supreme Court has identified six separate grounds on which a claim is rendered

15 nonjusticiable:

16 (1) a textually demonstrable constitutional commitment of the issue to a

17 coordinate political department; or (2) a lack of judicially discoverable and

18 manageable standards for resolving it; or (3) the impossibility of deciding without

19 an initial policy determination of a kind clearly for nonjudicial discretion; or (4)

20 the impossibility of a court's undertaking independent resolution without

21 expressing lack of the respect due coordinate branches of government; or (5) an

22 unusual need for unquestioning adherence to a political decision already made; or

23 (6) the potentiality of embarrassment from multifarious pronouncements by

24 various departments on one question.

25 *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker*, 369 U.S. at 217). This case

26 implicates many of the *Baker* grounds.

27 The first *Baker* ground is met because resolution of the issues surrounding global

28 warming implicate matters that are constitutionally committed to the political branches. Foreign

29 policy is committed by the text of the Constitution to the Office of the President. U.S. Const. art.

1 II §§ 2, 3. Congress is empowered to regulate foreign and domestic commerce. U.S. Const. art.
 2 I § 8. The fundamental separation of powers principles embodied in the Constitution would be
 3 meaningless if the judiciary were to take over formulation and implementation of domestic
 4 economic and energy policy and to restrict the President's international negotiating strategy on
 5 climate change by subjecting lawful business activities to "global warming" tort liability.
 6

7 On the second *Baker* ground, the judicial branch of government is not equipped with a set
 8 of "manageable standards" for resolving the challenges presented by the scientific theories of
 9 global warming. Nor are courts equipped to formulate the nation's policy on the issue. Plaintiffs
 10 nevertheless ask this Court to find Peabody – a coal producer engaged in legal business conduct
 11 – responsible for emitting certain gases, thereby causing global warming, thereby causing arctic
 12 sea ice to melt, thereby exposing plaintiffs' village to greater coastal erosion during winter sea
 13 storms.
 14

15 The third *Baker* ground is implicated because an "initial policy determination" (*Jubelirer*,
 16 541 U.S. at 278) regarding global warming theory and regulation is inextricably intertwined with
 17 the Complaint's request for relief. In suing Peabody on a "nuisance" theory, plaintiffs
 18 effectively ask the Court to rule on our nation's choices about use of fossil fuels for energy, and
 19 more generally to decide the energy policy of the United States Government. Doing so would
 20 implicate the fourth *Baker* ground, in that it would be tantamount to this Court announcing the
 21 country's energy policy to Congress and the Executive Branch and directing a new and different
 22 regulatory approach with respect to entities such as Peabody.
 23

24 **2. Other Courts Have Dismissed Similar Cases on Political Question
 25 Grounds.**

26 Other courts faced with similar lawsuits have dismissed them, recognizing that the courts
 27
 28

1 are not the appropriate forum to resolve disputes arising out of injuries allegedly caused by
 2 global warming. In *AEP*, the plaintiffs sought abatement of the defendant electric utilities'
 3 alleged "contributions to the phenomenon commonly known as global warming." 406 F. Supp.
 4 2d at 268. The *AEP* plaintiffs alleged that the defendants were the largest emitters of carbon
 5 dioxide in the United States, and asserted (as plaintiffs assert here) that plaintiffs' case was "a
 6 simple nuisance claim of the kind courts have adjudicated in the past." *Id.* at 272. After
 7 analyzing the political question jurisprudence, and taking into consideration the extensive public
 8 track record of executive and congressional action on global warming, the Southern District of
 9 New York court dismissed the action. In the *AEP* court's words, "none of the pollution-as-
 10 public-nuisance cases cited by Plaintiffs has touched on so many areas of national and
 11 international policy. The scope and magnitude of the relief Plaintiffs seek reveals the
 12 transcendentally legislative nature of this litigation." *Id.* (emphasis added). As the *AEP* court
 13 recognized, the claims before it could not be adjudicated without addressing the "initial policy
 14 determination[s]" surrounding global warming, determinations which have been and remain "an
 15 undertaking for the political branches." *Id.* at 273-74. The Southern District of Mississippi court
 16 reached a similar conclusion in *Comer*, finding that the claims in that case raised nonjusticiable
 17 political questions. *See* Exh. 1.

20 Likewise, in *California v. General Motors Corp.*, another judge of this Court reached a
 21 similar result. In that case, the State of California sued General Motors and other automakers for
 22 creating or contributing to global warming, which the State of California packaged as a public
 23 nuisance. As in *AEP* and *Comer*, the Court dismissed the claims as raising nonjusticiable
 24 political questions. *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at
 25 *14 (N.D. Cal. Sept. 17, 2007).

1 The same outcome follows here. It is irrelevant for purposes of the political question
 2 analysis that plaintiffs seek monetary damages rather than abatement or other injunctive relief.
 3 An award of damages is no less a form of regulation than an injunction, a statute or an Executive
 4 Order. “The obligation to pay compensation can be, indeed is designed to be, a potent method of
 5 governing conduct and controlling policy.” *Cipollone*, 505 U.S. at 521. *See also Perry v.*
 6 *Mercedes-Benz of N. Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (“We agree [with our sister
 7 circuit courts] that state damages awards based on tort liability can have a regulatory effect.”)
 8 (alteration added). Where, as here, resolution of plaintiffs’ claims would impinge on the
 9 prerogatives of the political branches of government, the form of relief sought is not
 10 determinative. For this reason, courts routinely dismiss cases seeking monetary damages on
 11 political question grounds. *See, e.g., Bancoult v. McNamara*, 445 F.3d 427, 438 (D.C. Cir. 2006)
 12 (dismissing suit for compensatory and punitive damages against United States and former
 13 government officials for eviction from island of Diego Garcia during the Cold War). *See also*
 14 *Antolok v. United States*, 873 F.2d 369, 383-84 (D.C. Cir. 1989) (“It is the political nature of the
 15 [merits] question, not the *tort* nature of the individual claims, that bars our review and in which
 16 the Judiciary has no expertise.”) (emphasis in original).

19 Indeed, in *California v. General Motors*, the Court addressed this very issue. The State
 20 of California attempted to distinguish *AEP* on grounds that the *AEP* plaintiffs sought equitable
 21 relief, whereas California was seeking damages. 2007 WL 2726871, at *8. The Court rejected
 22 this distinction, stating that “[r]egardless of the type of relief sought, the Court must still make an
 23 initial policy decision in deciding whether there has been an unreasonable interference with a
 24 right common to the general public.” *Id.* (citation and internal quotation marks deleted). The
 25 Court observed that in order to find for plaintiffs, it would necessarily have to create a standard
 26

1 by which alleged emitters could be judged, which would necessarily require it to weigh
 2 competing interests – environmental, economic, industrial development – which are the
 3 bailiwick of the political branches, not judges and juries. *Id.*

4 Because the questions framing this action ““uniquely demand single-voiced statement of
 5 the Government’s views,”” they are “political questions that are consigned to the political
 6 branches.” *AEP*, 406 F. Supp. 2d at 274 (citing *Baker*, 369 U.S. at 211). Allowing this lawsuit
 7 to proceed would pit this Court against decades of efforts by the two political branches on the
 8 subject of greenhouse gas emissions.

10 **D. Plaintiffs’ Federal Common Law Claim Is Displaced and State
 11 Common Law Claims Are Preempted.**

12 Plaintiffs’ purported federal common law claim conflicts with, and is therefore displaced
 13 by, federal law and other actions and policies of the political branches. This is true for two
 14 reasons: the claim (1) conflicts with the regulatory approach Congress has opted to take with
 15 respect to global warming; and (2) conflicts with the political branches’ control over our nation’s
 16 foreign policy.

17 **1. The Federal Common Law Claim is Displaced.**

18 Federal courts, unlike state courts, do not have the power to develop and apply their own
 19 rules of decision – they are not common law courts. *See City of Milwaukee v. Illinois*, 451 U.S.
 20 304, 312-13, 317 (1981); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1201 (9th Cir.
 21 1988). The notion of a “federal common law” is thus an extremely limited one, and is found
 22 only where Congress has given the courts the power to develop substantive law, or where “a
 23 federal rule of decision is necessary to protect uniquely federal interests.” *Texas Indus., Inc. v.
 24 Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (emphasis added). For the most part, private
 25

1 rights of action are for Congress to create. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727
 2 (2004); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Milwaukee*, 451 U.S. at 313 (stating
 3 that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), stands for the proposition that federal
 4 courts should leave the creation of private causes of action to Congress).

5 This is especially true where (1) the “collateral consequences” of recognizing such an
 6 action would have a potential adverse risk on foreign relations, *Sosa*, 542 U.S. at 727; or (2)
 7 Congress has already addressed the issue at hand and provided a remedy. *Milwaukee*, 451 U.S.
 8 at 314-15; *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). Both concerns militate in favor
 9 of holding that to the extent a federal common law “global warming” nuisance claim even exists,
 10 it has been displaced by the actions of Congress and the Executive.

12 The past actions of the political branches demonstrate a clear foreign policy objective of
 13 refraining from joining a global alliance to severely curtail carbon dioxide emissions unless the
 14 emissions of developing nations are similarly curtailed. Furthermore, as the Supreme Court
 15 recognized in *Massachusetts v. EPA*, Congress already has provided a mechanism for regulating
 16 domestic greenhouse gas emissions in the Clean Air Act, upon a finding by EPA that such
 17 emissions endanger human health or welfare. *See Massachusetts v. EPA*, 127 S. Ct. at 1462; 42
 18 U.S.C. § 7521(a)(1) (2006). If Congress desires a different approach, it is free to enact new
 19 legislation. What is clear is that Congress has spoken directly on this issue, and there is no room
 20 for the federal courts to craft their own rules of decision.⁵ *See Milwaukee*, 451 U.S. at 317. *See*
 21 *also Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (citing *Milwaukee* in

24 ⁵ Were the Court to find plaintiffs’ state law nuisance claims tenable (which it should not for the
 25 reasons stated below), the federal common law claim should be dismissed because there cannot
 26 be both a federal and state common law governing the same conduct. *See National Audubon*,
 27 869 F.2d at 1204.

1 concluding that “federal common law has been preempted as to every question to which the
 2 legislative scheme ‘spoke directly,’ and every problem that Congress has ‘addressed,’” and
 3 pointing out that “separation of powers concerns create a presumption in favor of preemption
 4 [displacement] of federal common law whenever it can be said that Congress has legislated on
 5 the subject”).
 6

7 **2. Plaintiffs’ State Common Law Nuisance Claims Are Preempted.**

8 For similar reasons, plaintiffs’ alternative state law nuisance claims are preempted. It is
 9 fundamental that where a state tort action would have a regulatory effect that conflicts with
 10 federal law, the tort action is preempted by that federal law. *See, e.g., Buckman Co. v. Plaintiffs’*
 11 *Legal Committee*, 531 U.S. 341, 348 (2001). In this case, plaintiffs’ state law nuisance claims, if
 12 successful, would essentially require Peabody to conduct its business operations (should it wish
 13 to avoid recurring liability) in a manner dictated by plaintiffs and this Court. The result would be
 14 regulation of Peabody’s business activities in a manner inconsistent with the policies established
 15 by our national political branches, including Congress’s authorization of EPA to regulate
 16 greenhouse gas emissions under the Clean Air Act, but only after that agency has made a
 17 determination that a particular greenhouse gas endangers human health. Because plaintiffs’ state
 18 law nuisance claims “must yield to the regulation of Congress,” they are preempted. *See Crosby*
 19 *v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Permitting 50 conflicting judge-made
 20 legal regimes to develop on top of this federal authority would be inimical to our federal system.
 21

22 As noted above, the regulatory effect of plaintiffs’ nuisance claims would also conflict
 23 with the ability of Congress and the Executive Branch to establish and coordinate the United
 24 States’ foreign policy on global warming. Through the UNFCCC, the Executive Branch, with
 25 the approval of the Senate, adopted a policy of working with other nations, through international
 26

1 bodies, to coordinate a cohesive approach to global warming. *See* UNFCCC, S. Treaty Doc. No.
 2 102-38 (President George H.W. Bush stating: “the global nature of climate change calls for the
 3 widest possible cooperation by all countries and their participation in an effective and
 4 appropriate international response”). It was to this end that, in 1997, the Senate passed a
 5 resolution objecting to the adoption of the Kyoto Protocol. Because the effects of such a tort
 6 regime bear directly on the political branches’ ability to conduct the nation’s foreign policy,
 7 plaintiffs’ state law nuisance claims are preempted. *See, e.g., Am. Ins. Ass’n v. Garamendi*, 539
 8 U.S. 396 (2003); *Crosby*, 530 U.S. at 373 (holding that state laws that stand as an obstacle to the
 9 execution of foreign policy are preempted).

11 **E. The Complaint Does Not Plausibly Demonstrate That Peabody**
 12 **Proximately Caused Plaintiffs’ Alleged Injuries.**

13 Plaintiffs’ nuisance claims under either federal or state common law suffer from
 14 the additional defect that the Complaint does not plausibly demonstrate Peabody
 15 proximately caused any injury allegedly suffered by the plaintiffs. *See Twombly*, 127 S.
 16 Ct. at 1974.

17 Proximate cause is a necessary element of plaintiffs’ nuisance claim. *See Martinez v.*
 18 *Pacific Bell*, 225 Cal. App. 3d 1557, 1565 (Cal. Ct. App. 1990). The concept of “proximate
 19 cause” is a familiar limitation on tort claims, invoked frequently in actions like this to
 20 “eliminate[] the bizarre” and to separate legitimate theories of liability from “various far-fetched
 21 hypotheticals.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536
 22 (1995) (citation omitted). As the United States Supreme Court has observed:

23 In a philosophical sense, the consequences of an act go forward to eternity, and
 24 the causes of an event go back to the dawn of human events, and beyond. But
 25 any attempt to impose responsibility upon such a basis would result in infinite
 26 liability for all wrongful acts, and would set society on edge and fill the courts
 27 with endless litigation.

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 266 n.10 (1992) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984) (internal quotations and citation omitted)).

To establish causation, a plaintiff must show a “direct relation between the injury asserted and the injurious conduct alleged.” *Id.* at 268. “Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.” *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 713 (1995) (O’Connor, J., concurring). Where a complaint does not contain facts that would permit an inference that defendant’s actions were the proximate cause of a plaintiff’s alleged injuries, courts do not hesitate to dismiss. *See, e.g., Martinez*, 225 Cal. App. 3d at 1566 (“[T]he issue of proximate cause ... becomes a question of law when the facts of the case permit only one reasonable conclusion.”) (citations omitted); *Port Auth. of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305, 317-18 (3d Cir. 1999) (proximate cause determination turns on “mixed considerations of logic, common sense, justice, policy and precedent,” and that “the court may conclude as a matter of law that defendants’ actions were not the proximate cause of the plaintiff’s injury”).

The indisputable fact that all living organisms, human and animal activity, and advanced
19 human efforts such as industrial and transportation methods, as well as innumerable planetary
20 events (such as volcanic eruptions and natural degradation of plant matter), emit greenhouse
21 gases precludes plaintiffs from showing that Peabody is the proximate cause of their alleged
22 injuries. Plaintiffs' Complaint does not plausibly demonstrate, or give rise to a reasonable
23 inference, that *Peabody*'s emissions of greenhouse gases were a substantial factor in bringing
24 about plaintiffs' alleged injuries.
25

1 Furthermore, plaintiffs must be able to show that their alleged injuries were proximately
2 caused by *Peabody's conduct*, and not merely the result of the independent and intervening acts
3 of others. *See Martinez*, 225 Cal. App. 3d at 1565. Although plaintiffs do not clearly allege
4 precisely what Peabody conduct is the basis for their nuisance claims, to the extent they base
5 their nuisance claims on Peabody's coal production (and not emissions), such conduct is too far
6 removed in the chain of causation to have proximately caused plaintiffs' alleged injuries. *See,*
7 *e.g.*, Complaint ¶ 178 (claiming that Peabody is responsible for "produc[ing] billions of tons of
8 coal for combustion that has resulted in the emissions of billions of tons of greenhouse gases").
9 Because plaintiffs cannot state that Peabody's activities constitute a substantial factor in causing
10 their alleged injuries, plaintiffs' claim for nuisance fails as a matter of law as to Peabody.
11

F. Plaintiffs' Damages Are Speculative.

Plaintiffs' state law nuisance claims also fail because they do not meet the requirements
of damage. "An essential element of a cause of action for nuisance is damage or injury." *See,*
e.g., Helix Land Co. v. City of San Diego, 82 Cal. App. 3d 932, 950 (Cal. Ct. App. 1978) (citing
Meigs v. Pinkham, 159 Cal. 104, 109 (1910)); *Jordan v. City of Santa Barbara*, 46 Cal. App. 4th
1245, 1257 (Cal. Ct. App. 1996) (citation omitted).

The Complaint purports to seek damages relating to injuries plaintiffs allege from coastal erosion to compensate them for the costs of relocation. Complaint ¶¶ 1, 250, 260, 264, 266. Given the ongoing efforts by the federal government to address these issues, plaintiffs' damages are too speculative to support a claim for relief. *Nat'l Audubon Soc'y Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002) (affirming dismissal based on plaintiffs' failure to state a claim where alleged damages rested on increased costs of flood damage that were "highly speculative").

1 **G. The Alleged Tortious Conduct Is Expressly Authorized by Statute.**

2 To the extent plaintiffs' nuisance claims against Peabody arise from the allegations of
 3 Peabody's emission of methane from mining operations (Complaint ¶ 177), they should be
 4 dismissed because that activity is expressly authorized by statute. Under the Federal Mine
 5 Safety and Health Act of 1977 ("Mine Act"), Congress mandated that all coal mines be
 6 ventilated so as to carry away gases, including methane. *See* 30 U.S.C. § 863(b) (2006).
 7 Pursuant to the regulatory authority provided under the Mine Act, the Secretary of Labor
 8 requires underground coal mines to be ventilated to maintain underground methane
 9 concentrations of less than one percent. *See* 30 C.F.R. § 75.323(b) (2007).

10 "[C]onduct that is fully authorized by statute, ordinance or administrative regulation does
 11 not subject the actor to tort liability." Restatement (Second) Torts § 821B cmt. f (1965). *See*
 12 also Cal. Civ. Code § 3482 (West 2008) ("Nothing which is done or maintained under the
 13 express authority of a statute can be deemed a nuisance."); *Farmers Ins. Exch. v. State*, 175 Cal.
 14 App. 3d 494, 503 (Cal. Ct. App. 1985) (plaintiffs' nuisance claim alleging property damages
 15 sustained from chemical release in a state pest eradication program barred by § 3482 because the
 16 state's statutes provided authority for the program and, pursuant to that authority, the Department
 17 of Food and Agriculture chose the precise means and methods to carry out the eradication
 18 program, including use of chemicals); *Friends of H St. v. City of Sacramento*, 20 Cal. App. 4th
 19 152, 161 (Cal. Ct. App. 1993) (plaintiffs' nuisance claims against the city of Sacramento arising
 20 out of damages allegedly caused by a nearby highway construction project barred by § 3482
 21 where several statutes authorized the city to maintain and manage its streets). Because plaintiffs'
 22 claims against Peabody hinge on conduct expressly authorized by federal law, they must be
 23 dismissed.

1 **H. Plaintiffs Fail to State a Claim for Civil Conspiracy.**

2 Plaintiffs purport to state a claim for conspiracy, alternatively under federal or state
 3 common law. Complaint ¶¶ 268-77. The federal common law claim for conspiracy fails
 4 because no such claim exists. *See Berard v. General Motors Corp.*, 493 F. Supp. 1035, 1042 (D.
 5 Mass. 1980).

6 Plaintiffs' vague conspiracy claim also fails because a claim of civil conspiracy cannot
 7 stand alone. Although it is not clear from the Complaint what plaintiffs allege Peabody
 8 conspired to do, if plaintiffs claim that Peabody conspired to commit or perpetuate a nuisance,
 9 the conspiracy claim fails because plaintiffs have failed to state a nuisance claim.

10 Where, as here, a plaintiff alleges a civil conspiracy to commit a tort, the source of
 11 substantive liability arises out of the breach of duty that gives rise to the underlying tort; liability
 12 is not created by participation in the alleged conspiracy alone. *See Chavers v. Gatke Corp.*, 107
 13 Cal. App. 4th 606, 614 (Cal. Ct. App. 2003) (citing *Applied Equip. v. Litton Saudi Arabia*, 7 Cal.
 14 4th 503, 514 (1994)); *see also* 5 B. Witkin, *Summary of California Law*, Torts § 44 (9th ed.
 15 1988) (“Strictly speaking, however, there is no separate tort of civil conspiracy, and there is no
 16 civil action for conspiracy to commit a recognized tort unless the wrongful act itself is
 17 committed and damage results therefrom.”); *Entm't Research Group, Inc. v. Genesis Creative*
 18 *Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997) (under California law, civil conspiracy is not a
 19 separate cause of action). Plaintiffs' claim for civil conspiracy fails because plaintiffs cannot
 20 show that Peabody owed a duty to plaintiffs or that Peabody breached a duty (*i.e.*, that Peabody
 21 acted tortiously toward plaintiffs). *Applied Equipment*, 7 Cal. 4th at 511. Because plaintiffs'
 22 nuisance claim fails, their claim for civil conspiracy also fails.

1 **I. Plaintiffs Fail to Plead Facts With Specificity Under Fed. R. Civ. P.
2 9(b).**

3 Although it is not clear from the allegations in the Complaint, to the extent plaintiffs
4 attempt to state a claim for conspiracy to commit fraud as to Peabody, the claim should be
5 dismissed because plaintiffs fail to allege any acts of fraud with the specificity required by Rule
6 9(b) of the Federal Rules of Civil Procedure.⁶ *See, e.g., Mintel Learning Tech., Inc. v. Beijing
7 Kaidi Educ.*, No. 06-7541, 2007 WL 2288329, *4 (N.D. Cal. Aug. 9, 2007). A plaintiff cannot
8 evade the heightened pleading requirements for fraud “by avoiding the use of that magic word.”
9 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003). Rule 9(b) imposes a
10 heightened pleading requirement when fraud forms the basis for a claim. *See Vess*, 317 F.3d at
11 1106 (Rule 9(b) requires notice of “particular misconduct” allowing defendants to “defend
12 against the charge and not just deny that they have done anything wrong”) (citations and internal
13 quotation marks omitted).

14 The Complaint offers no specifics about Peabody’s supposedly *misleading* conduct.⁷
15 Instead, it refers vaguely to the activities of certain trade associations, groups, and organizations
16 that allegedly represent “the coal industry” or that have the word “coal” in their names. *See, e.g.*,
17 Complaint ¶¶ 190, 194, 201. The Complaint offers no allegations about Peabody’s supposed role
18 in these groups, or exactly when, where, or how Peabody contributed to a purported campaign to
19

20 ⁶ The Complaint states that “[t]here has been a long campaign by power, coal, and oil companies
21 to *mislead* the public about the science of global warming” and “[t]he purpose of this campaign
22 has been to enable the electric power, coal, oil and other industries to continue their conduct
23 contributing to the public nuisance of global warming by convincing the public at-large and the
24 victims of global warming that the process is not man-made when in fact it is.” Complaint ¶ 189
25 (emphasis added); *see also id.* ¶ 269.

26 ⁷ Nor is there any allegation that anyone was actually misled, let alone by *Peabody*. Thus, any
27 fraud-based conspiracy claim fails for lack of reliance. *See Vess*, 317 F.3d at 1105.

1 mislead the public. In fact, apart from the first paragraph under the Complaint's "civil
 2 conspiracy allegations," which alleges that Peabody was one of eight defendants involved in a
 3 campaign to mislead the public about the science of global warming, Peabody is not even
 4 mentioned in the conspiracy allegations. Under Rule 9(b), the conspiracy claim against Peabody
 5 fails. *See Mintel Learning Tech.*, 2007 WL 2288329, at *11 (claims for fraudulent conduct must
 6 allege the precise time, place, and nature of the misleading statements, misrepresentations, or
 7 specific acts of fraud) (citing *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994); *In re GlenFed,*
 8 *Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994), superseded by statute on other grounds,
 9 Private Sec. Litig. Reform Act of 1995, 15 U.S.C. § 78u-4 (2006)).

11 **J. Peabody's Actions Are Protected by the First Amendment.**

12 In defiance of one last constitutional safeguard, plaintiffs seek to regulate speech. In
 13 particular, they seek to forbid the sharing of information with which they do not agree.
 14 Assuming for arguments' sake that various parties, including Peabody, hatched a plan to cast
 15 doubt in the public's mind about the science of global warming, they had an absolute right to do
 16 so under the First Amendment.

18 The Complaint alleges a deception of the public about global warming, effectuated
 19 through articles in the *Wall Street Journal*, *Washington Times*, and *New York Times* (Complaint
 20 ¶¶ 191, 218-19), through radio and television campaigns and the mails (*id.* ¶¶ 194, 222), and
 21 through presentations, press releases, and the publication of reports, memos, and newsletters, all
 22 distributed to the public or available for public review (*id.* ¶¶ 204, 205, 207, 212-13, 223, 229).
 23 Plaintiffs allege, in short, that defendants have engaged in the lawful, free exercise of speech on
 24 an issue of profound public interest. *See Vess*, 317 F.3d at 1110 (medical professional
 25 association's publication of its diagnostic manual and advocacy group's public campaign touting
 26

1 the benefits of a particular drug were protected speech, notwithstanding alleged conspiracy
 2 consisting of acts of making false statements and misrepresentations, and spreading
 3 misinformation); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446-47 (2d Cir. 2001)
 4 (recognizing that it is well settled that the First Amendment protects “scientific expression and
 5 debate” as much as political or artistic expression) (citation omitted).

6 Plaintiffs’ allegations of “falsity” presupposes that debate regarding the causes and
 7 effects of global warming opinion is both inappropriate and closed to further scientific and
 8 political scrutiny.⁸ The airing of opposing and even controversial opinions, however, is the
 9 lifeblood of the First Amendment. Participating in public debate on a matter of public
 10 importance is not tortious, and neither is joining with others to spread one’s message. *See*
 11 *Thornhill v. State of Alabama*, 310 U.S. 88, 101-02 (1940) (“The freedom of speech ...
 12 guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully
 13 all matters of public concern without previous restraint or fear of subsequent punishment.”);
 14 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) (“one of the foundations of our
 15 society is the right of individuals to combine with other persons in pursuit of a common goal by
 16 lawful means”).

17 **K. Plaintiffs Fail to State a Claim for Concert of Action.**

18 Plaintiffs’ “concert of action” claim – apparently an attempt to hold Peabody jointly and
 19 severally liable for the whole of plaintiffs’ alleged damages (*see* Complaint ¶ 282) – does not
 20 state a cognizable claim. The concert of action theory of liability was first recognized in
 21 *Summers v. Tice*, 33 Cal. 2d 80 (1948). There, the plaintiff was struck in the eye when two

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⁸ The Complaint itself demonstrates the value of the debate, noting that some of the alleged
 “conspirators” re-thought their positions over time. *See, e.g.*, Complaint ¶¶ 209, 243.

1 hunters each negligently shot their guns in his direction. Although plaintiff could not establish
 2 which of the two hunters was directly responsible for his injuries, the court held that he could
 3 recover damages from both. *Id.* at 86. Following *Summers*, California courts have imposed
 4 liability on such grounds only in limited circumstances in which a small number of individuals
 5 engaged in actions occurring over a discrete and brief period of time that caused injury to a
 6 single plaintiff. *See, e.g., Chavers*, 107 Cal. App. 4th at 615. In such circumstances, defendants
 7 are held liable either as a direct participant in the acts which caused injury, or because they
 8 encouraged and assisted the person who directly caused the injuries by participating in joint
 9 activity. *See Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 605-06 (1980).

11 Here, plaintiffs cannot demonstrate that Peabody directly caused any damages or
 12 encouraged others who have. *See Restatement (Second) of Torts* § 876 (concert of action
 13 liability may attach to an actor who personally causes harm to plaintiff as well as one who
 14 “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or
 15 encouragement to the other”). There is no allegation that Peabody is directly responsible for any
 16 tortious conduct against plaintiffs, and the Complaint is equally devoid of allegations that
 17 Peabody has given “substantial assistance or encouragement” to anyone who has personally
 18 caused harm to plaintiffs. Plaintiffs’ incantation of “conspiracy” is not enough. *See Twombly*,
 19 127 S. Ct. at 1965 (“a formulaic recitation of the elements of a cause of action will not do”).
 20

22 The remedy for plaintiffs’ loss of their lands does not lie in this Court. The Corps noted
 23 in a 2006 Report outlining relocation options for Kivalina that “[i]t has long been apparent that
 24 the island would eventually succumb to natural forces, and that the village would have to be
 25 moved.” U.S. Army Corps of Engineers, *Kivalina Relocation Master Plan, Final Report* ES-1.
 26 No case law supports holding Peabody jointly and severally liable with others under a “concert
 27

1 of action" theory for "the natural forces" that have long been eroding plaintiffs' homeland, and
2 this case should not be used as the vehicle for a novel extension of this theory of relief. *See, e.g.*,
3 *Moore v. Regents of the Univ. of California*, 51 Cal. 3d 120, 142 (1990) (declining to extend
4 traditional tort principles to cover plaintiff's novel claim for conversion where issues raised by
5 plaintiff's claim were better suited to legislative resolution).

6

7 **CONCLUSION**

8 The Complaint should be dismissed as to Peabody Energy Corporation for lack of subject
9 matter jurisdiction and for failure to state a claim.

10

11 DATED: June 30, 2008

Respectfully Submitted,

12

CROWELL & MORING LLP
13 By: /s/ STEVEN P. RICE

14

Attorney for Defendant
15 PEABODY ENERGY CORPORATION

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CERTIFICATE OF SERVICE

I, Tracy A. Roman, certify that on June 30, 2008, I electronically filed the foregoing Notice of Motion and Motion to Dismiss of Defendant Peabody Energy Corporation for Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) and for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6), as well as the accompanying Proposed Order, through the Court's ECF System and the document is available for downloading. I also certify that on June 30, 2008, copies of the foregoing documents were served via U. S. Mail on the following:

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ATTESTATION OF SIGNATURES

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S) within this e-filed document.

/s/ Tracy A. Roman

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

NED COMER, ET AL.	§	PLAINTIFFS
	§	
v.	§	Civil Action No. 1:05-CV-436-LG-RHW
	§	
MURPHY OIL USA, INC., ET AL.	§	DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE CAME BEFORE THE COURT for hearing of the Motion to Dismiss [146] filed on June 30, 2006, by Defendants, Alliance Resource Partners, L.P., Alpha Natural Resources, Inc., Arch Coal, Inc., CONSOL Energy Inc., Foundation Coal Holdings, Inc., International Coal Group, Inc., Massey Energy Company, Natural Resource Partners L.P., Peabody Energy Corporation, and Westmoreland Coal Company, and joined by Defendants, Allegheny Energy Corp., Entergy Corp., and Reliant Energy Corp. A hearing was conducted on August 30, 2007, at which counsel for Plaintiffs and Defendants appeared. For the reasons stated into the record at hearing, the Court finds that Plaintiffs do not have standing to assert claims against Defendants and that Plaintiffs' claims are non-justiciable pursuant to the political question doctrine. Defendants' Motion to Dismiss is therefore granted. Furthermore, due to the lack of standing, the Court finds that Plaintiffs' claims against all defendants should be dismissed *sua sponte*.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion to Dismiss [146] filed by Defendants, Alliance Resource Partners, L.P., Alpha Natural Resources, Inc., Arch Coal, Inc., CONSOL Energy Inc., Foundation Coal Holdings, Inc., International Coal Group, Inc., Massey Energy Company, Natural Resource Partners L.P., Peabody Energy Corporation, and

Westmoreland Coal Company, and joined by Defendants, Allegheny Energy Corp., Entergy Corp., and Reliant Energy Corp., is **GRANTED**. Plaintiffs' claims against these defendants are hereby **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' claims against all other defendants are *sua sponte* **DISMISSED WITH PREJUDICE** for lack of standing.

IT IS FURTHER ORDERED AND ADJUDGED that all remaining pending motions are hereby rendered **MOOT**.

SO ORDERED AND ADJUDGED this the 30th day of August, 2007.

s/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

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12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

15 OAKLAND DIVISION

16 NATIVE VILLAGE OF KIVALINA, *et al.*,) CASE NO. C08-01138 SBA
17 Plaintiffs,)
18 v.)
19 EXXONMOBIL CORPORATION, *et al.*,)
20 Defendants)
21

22 **PROPOSED ORDER GRANTING MOTION TO DISMISS**
OF DEFENDANT PEABODY ENERGY CORPORATION
FOR LACK OF SUBJECT MATTER JURISDICTION
AND FAILURE TO STATE A CLAIM

24 This cause came before the Court for hearing of the Motion to Dismiss of Defendant
25 Peabody Energy Corporation for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P.
26 12(b)(1) and for Failure to State a Claim Upon Which Relief May be Granted Pursuant to Fed. R.
27 Civ. P. 12(b)(6), filed on June 30, 2008. A hearing was conducted on December 9, 2008, at

1 which counsel for plaintiffs and defendants appeared.

2 After consideration of the arguments, this Court finds the following:

3 1) Plaintiffs do not have standing to bring their claims, because plaintiffs' alleged
 4 injury is not fairly traceable to Peabody nor redressable by this Court. *See Bennett v. Spear*, 520
 5 U.S. 154, 162 (1997); *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007)
 6 (unpublished), *appeal docketed*, No. 07-60756 (5th Cir. Oct. 22, 2007).

7 2) Plaintiffs' "global warming" tort claims raise nonjusticiable political questions
 8 under the factors articulated by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).
 9 *See California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *14 (N.D. Cal.
 10 Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 273-74 (S.D.N.Y.
 11 2005), *appeal docketed*, 05-5104 (2d Cir. Sept. 22, 2005).

12 3) Plaintiffs' claims are both displaced and preempted by federal law and the
 13 policies of the political branches in the areas of climate change, energy security, and foreign
 14 relations. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981); *Buckman Co. v.*
 15 *Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001).

16 4) Plaintiffs have failed to state a claim for nuisance under either federal or state
 17 common law because the Complaint does not plausibly demonstrate that Peabody proximately
 18 caused plaintiffs' alleged injuries and plaintiffs cannot show that they have in fact been injured.
 19 *See Martinez v. Pacific Bell*, 225 Cal. App. 3d 1557, 1565-66 (Cal. Ct. App. 1990); *Helix Land*
 20 *Co. v. City of San Diego*, 82 Cal. App. 3d 932, 950 (Cal. Ct. App. 1978) (citing *Meigs v.*
 21 *Pinkham*, 159 Cal. 104, 109 (1911)).

22 5) Plaintiffs' claims against Peabody fail to the extent they are directed at conduct that is
 23 expressly sanctioned by statute and regulations authorizing Peabody to release methane. *See*
 24 Cal. Civ. Code § 3482; 30 U.S.C. § 863(b); 30 C.F.R. § 75.323(b).

6) Plaintiffs likewise fail to state a claim for civil conspiracy because there is no underlying, adequately pleaded nuisance claim, and plaintiffs have not fulfilled the heightened pleading requirements to sustain a claim that sounds in fraud. *See Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 211, 1228 (9th Cir. 1997); *Mintel Learning Tech., Inc. v. Beijing Kaidi Educ.*, No. 06-7541, 2007 WL 2288329, *4 (N.D. Cal. Aug. 9, 2007).

7) To the extent plaintiffs' conspiracy claim rests on the falsity of statements allegedly made by Peabody in the public arena, the claim is also barred by the First Amendment. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003).

5) Plaintiff fail to state a claim for concert of action because such claims are inappropriate where, as in this case, every living being emits the types of gases that plaintiffs claim are responsible for their alleged damages. *See Chavers v. Gatke Corp.*, 107 Cal. App. 4th 606, 615 (Cal. Ct. App. 2003).

For all of these reasons, this Court lacks subject matter jurisdiction over plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and plaintiffs have failed to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

It is hereby ORDERED AND ADJUDGED that the Motion to Dismiss of Defendant Peabody Energy Corporation for Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) and for Failure to State a Claim Upon Which Relief May Be Granted Pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED and plaintiffs' claims are hereby DISMISSED with prejudice as to Peabody.

So ORDERED AND ADJUDGED this the day of , 2008.

Saundra Brown Armstrong
United States District Judge